

Message

From: OCSPPCorrespondence [OCSPPCorrespondence@epa.gov]
Sent: 3/8/2021 9:48:22 PM
To: Blair, Susanna [Blair.Susanna@epa.gov]; Collazo Reyes, Yvette [CollazoReyes.Yvette@epa.gov]; Dennis, Allison [Dennis.Allison@epa.gov]; Diaz, Catherine [Diaz.Catherine@epa.gov]; Drinkard, Andrea [Drinkard.Andrea@epa.gov]; Freedhoff, Michal [Freedhoff.Michal@epa.gov]; Garcia, Beth [garcia.beth@epa.gov]; Goodis, Michael [Goodis.Michael@epa.gov]; Hanley, Mary [Hanley.Mary@epa.gov]; Hartman, Mark [Hartman.Mark@epa.gov]; Hauff, Amanda [Hauff.Amanda@epa.gov]; Henry, Tala [Henry.Tala@epa.gov]; Hughes, Hayley [hughes.hayley@epa.gov]; Kaiser, Sven-Erik [Kaiser.Sven-Erik@epa.gov]; Keigwin, Richard [Keigwin.Richard@epa.gov]; Kochis, Daniel [Kochis.daniel@epa.gov]; Kramer, George [Kramer.George@epa.gov]; Labbe, Ken [Labbe.Ken@epa.gov]; Layne, Arnold [Layne.Arnold@epa.gov]; Messina, Edward [Messina.Edward@epa.gov]; Nguyen, Khanh [Nguyen.Khanh@epa.gov]; OPP Branch Chiefs [OPP_Branch_Chiefs@epa.gov]; OPP Deputy & Associate Directors [OPP_Deputy_&Associate_Directors@epa.gov]; OPP Division Directors [OPP_Division_Directors@epa.gov]; OPP IO [OPP_IO@epa.gov]; OPPT Managers [OPPT_Managers@epa.gov]; OPS CSID CB [OPS_CSID_CB@epa.gov]; Picone, Kaitlin [Picone.Kaitlin@epa.gov]; Pierce, Alison [Pierce.Alison@epa.gov]; Richmond, Jonah [Richmond.Jonah@epa.gov]; Schmit, Ryan [schmit.ryan@epa.gov]; Siciliano, CarolAnn [Siciliano.CarolAnn@epa.gov]; Sullivan, Melissa [sullivan.melissa@epa.gov]; Tyler, Tom [Tyler.Tom@epa.gov]; Vendinello, Lynn [Vendinello.Lynn@epa.gov]; Vernon, Jennifer [Vernon.Jennifer@epa.gov]
Subject: OCSPP News for March 8, 2021
Attachments: Inside TSCA newsletter.pdf

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Ewire: Senate expected to back Regan's nomination to lead EPA

NA, Inside EPA

https://insideepa.com/daily-feed/ewire-senate-expected-back-regan-s-nomination-lead-epa?utm_source=dlvr.it&utm_medium=twitter

The Senate is poised to vote as early as March 9 on President Joe Biden's nomination of Michael Regan to be the next EPA administrator, and he is expected to easily win confirmation with bipartisan support.

The Hill reports that Senate Majority Leader Chuck Schumer (D-NY) has scheduled the vote, along with votes on other Biden nominees including U.S. Court of Appeals for the District of Columbia Circuit Judge Merrick Garland to be attorney general and Rep. Marcia Fudge (D-OH) to lead the Department of Housing and Urban Development.

Regan is likely to easily win confirmation as his nomination cleared the Senate Environment & Public Works (EPW) Committee on Feb. 9 by a 14-6 vote, winning approval from all 10 Democrats and four Republicans: Sens. Kevin Cramer (ND), Lindsey Graham (SC), Dan Sullivan (AK) and Roger Wicker (MS).

In his testimony at his Feb. 3 EPW confirmation hearing, and in subsequent written answers to senators' questions, Regan vowed to protect agency scientists from political interference and to make environmental justice (EJ) a cornerstone of EPA actions.

Regan also committed to making per- and polyfluoroalkyl substances a top priority for the agency and to working to resolve a number of air and climate issues, including state air transport concerns methane emissions, and renewable fuel standard program transparency, among other vows.

And he has said will pursue an "assessment" of Trump EPA actions in line with Biden's directive to review specific policies for revision but will focus more on collaborative approaches in crafting new high-priority policies. "We have a short amount of time, so we're going to have to walk and chew gum at the same time. My goal is to do an assessment to determine how can we best move forward, learn from the past, but stay leaning forward as we solve some of these complex issues," Regan told Sen. Sheldon Whitehouse (D-RI) at his confirmation hearing.

But if he wins confirmation, Regan could immediately face "turf wars" with the White House on the key issue of tackling climate change because there are so many officials now working on climate change policies across the Biden administration, including former Obama EPA Administrator Gina McCarthy.

Meanwhile, Biden's nomination of Janet McCabe to be deputy EPA chief is facing some resistance, with West Virginia Attorney General Patrick Morrisey (R) urging EPW members to oppose McCabe due to her role in crafting Obama-era air rules.

The opposition likely also creates pressure on potential swing vote Sen. Joe Manchin (D-WV), who chairs the energy panel and is not a member of EPW, to oppose McCabe if her nomination reaches the Senate floor.

Because the Senate is divided 50-50, if Manchin opposes McCabe, she would need a Republican to vote for her. The most likely prospects for supporting the nomination are GOP moderates Sen. Susan Collins (ME) and Lisa Murkowski (AK). Collins on July 18, 2013, did vote to confirm McCarthy as Obama's second EPA administrator, although Manchin and Murkowski both voted no.

'Forever Chemicals' Stop Mosquito Control Shipments: EPA (1)

Pat Rizzuto, Bloomberg Law

<https://news.bloomberglaw.com/environment-and-energy/forever-chemicals-stop-mosquito-control-shipments-epa-says>

An unidentified manufacturer of mosquito control products has agreed to stop shipping its formulations in plastic containers that EPA tests revealed leached "forever chemicals" into its sprays, the agency announced Friday.

The Environmental Protection Agency also detailed several steps that it's asking the pesticide, plastics, and other industries to take, and efforts it will make to collect additional information to address the possibility that per- and polyfluoroalkyl substances, or PFAS, can transfer from container linings into the chemicals they hold.

The agency's actions stem from an incident last September in which Public Employees for Environmental Responsibility, or PEER, reported to state officials that there were unspecified PFAS in a pesticide used for mosquito control.

EPA tested plastic, or "high-density polyethylene," or HDPE, containers made with and without the PFAS coatings, but containing a mosquito control product. It found eight PFAS at levels ranging from 20-50 parts per billion.

Companies use fluorinated plastic containers because the PFAS creates a barrier to prevent changes in the chemicals it contains, the agency said. "Using fluorinated sealed technology improves container stability, and is intended to make containers less permeable, reactive and dissolvable."

Industry Awareness Raising

The agency urged the pesticide industry to explore alternative packaging options, like steel drums or non-fluorinated HDPE.

The EPA said it's working with the Food and Drug Administration (FDA), Department of Agriculture (USDA), Ag Container Recycling Council, the American Chemistry Council, Crop Life America, the Household & Commercial Products Association, and the National Pest Management Association to raise awareness of this emerging issue and discuss expectations of product stewardship.

Bloomberg Law sought comment from industry groups on the awareness initiative. CropLife America spokesperson Sarah Macedo said it encourages members to "support product stewardship" and follow agency recommendations.

"EPA has discussed this issue several times with our industry and we know our members are taking active steps to evaluate their supply chains," Macedo said by email.

Tom Flanagan, a spokesman for the American Chemistry Council, said: "EPA is still collecting information on this matter so it's premature to draw specific conclusions until further work is conducted by EPA."

The council is working with the agency and other stakeholders to better understand this issue, and remains committed to ensuring strong policies are in place that protect human health and the environment, he said.

The agency also is generating a variety of data, including testing different brands of fluorinated containers, to determine whether they leach PFAS, and if so, learn the conditions affecting leaching.

The agency is focusing on PFAS because some, including one of the eight it detected leaching from the plastic container, perfluorooctanoic acid (PFOA), simply do not break down in the environment and are associated with health problems including increased cholesterol, weakened immune systems, and cancer.

EPA Staff Readying Next Steps On TSCA Despite Uncertain Biden Agenda

Maria Hegstad, Inside TSCA

<https://insideepa.com/tsca-news/epa-staff-readying-next-steps-tsca-despite-uncertain-biden-agenda>

With wide-ranging reviews of Trump EPA actions ongoing, career TSCA staff remain unsure of the new administration's broader plans for the program, one official says, even as they continue work on new chemical rules and evaluations required by the law -- a situation likely exacerbated by the lack of Senate-confirmed agency leaders.

"I wished my presentation would be able to update you if there were any updates available. Unfortunately, that is not the case and I'm sure there are questions from everyone, myself included, about what the TSCA future looks like, what year five and six looks like," Susanna Blair, special assistant and advisor to the director and deputy director of EPA's toxics office, told attendees at a March 3 Toxic Substances Control Act (TSCA) workshop hosted by the American Chemistry Council as part of the run-up to its annual GlobalChem conference.

"But at this point we don't have anything concrete with respect to significant changes with TSCA implementation."

Blair said the new administration is "reviewing TSCA implementation and taking any steps to ensure that the actions protect human health and the environment. . . . Folks have seen the list of some of the actions that are being reviewed under the administration and these are being reviewed in light of the executive orders, particularly around environmental justice scientific integrity and regulatory review. "

"The agency and the administration are committed to transparency with all stakeholders as these are reviewed, but all this is to say that unfortunately, there have not been many public statements that have been made about what that review may change, update, and what we can expect in the TSCA community," she added.

Blair's remarks came on the same day that Janet McCabe, President Joe Biden's nominee to serve as EPA's deputy administration, had her confirmation hearing before the Senate environment committee -- though she is still awaiting a committee vote that would clear her for consideration by the full Senate.

And while the panel has advanced Michael Regan, Biden's nominee to lead EPA, the chamber has not scheduled a floor vote on his confirmation. Moreover, even though President Joe Biden has named political appointees as acting heads of each major agency office, including its toxics office, he has yet to nominate any of the assistant administrators who will seek Senate confirmation to permanently lead those offices.

Rather than detailing the Biden administration's plans for TSCA, Blair sought to provide context to the agency's experience implementing the law since Congress overhauled it in 2016, and to update attendees on how staff are approaching their mandatory duties.

She noted, for example that among staff "there's a lot of thinking already going into what the" third group of existing chemicals to undergo prioritization for risk evaluation "will look like and our data availability and begin[ing] to seek public input on that." She said she anticipates a public process seeking information on these chemicals "hopefully later this year."

That planning will be a constant feature in the TSCA program going forward, now that the agency has completed its first group of 10 evaluations. The reformed TSCA required EPA to evaluate risks from 10 existing chemicals within three and one-half years as a first step in implementing the law. With that process complete, the agency is now evaluating a second block of 20 substances and TSCA now requires the agency to start a new evaluation to replace each finished one, so it always has 20 in progress at any time.

Since TSCA says evaluations are to take no more than three and one-half years, meaning the current set of 20 are due to be finalized in June 2023, and prioritization of each batch of chemicals lasts nine to 12 months, EPA is planning to begin prioritizing the third batch of 20 chemicals in June 2022, according to Blair's presentation.

But she noted that staff are aiming to spread out [...]

Court Backs CPSC Phthalate Ban, Boosting Environmentalists' Efforts

David LaRoss, Inside TSCA

<https://insideepa.com/tsca-news/court-backs-cpsc-phthalate-ban-boosting-environmentalists-efforts?s=na>

A federal appeals court has largely upheld the Consumer Product Safety Commission's (CPSC) 2017 rule banning sales of toys made with five phthalates and its chemical risk assessment that justified the ban, a victory for environmentalists seeking broad limits on the chemicals under TSCA, state laws and other federal programs.

The March 1 unanimous decision from the U.S. Court of Appeals for the 5th Circuit in *Texas Association Of Manufacturers, et al., v. CPSC* partly remands the commission's 2017 phthalate limits so that it can conduct a more complete economic analysis and seek a new round of public comments.

But it rejects arguments that the body lacked authority to craft its rule, that it was impermissibly regulating "risk" rather than "harm" from the chemicals, and that the risk and hazard findings that it relied on in the regulatory process were flawed.

"Ultimately, the Commission applied the proper health standards to its rulemaking," reads the decision, which is authored by Chief 5th Circuit Judge Priscilla Owen, and signed by Judges Stephen A. Higginson and Leslie H. Southwick. "We are not free to second-guess the Commission's determinations as to statistical methods and scientific data."

CPSC crafted its rule under a 2008 law requiring it to restrict phthalates that threaten children's health. It ultimately found that in addition to diisononyl phthalate (DINP) -- which is one of three chemicals the statute targeted for interim restrictions prior to the full rulemaking -- four others should be banned in concentrations above 0.1 percent because they "contribute to the cumulative risk" to children.

Those are diisobutyl phthalate (DIBP), di-n-pentyl phthalate (DPENP), di-n-hexyl phthalate (DHEXP), and dicyclohexyl phthalate (DCHP).

Environmentalists welcomed the move as part of a broad push for bans or harsh limits on phthalates under a host of authorities including the Toxic Substances Control Act (TSCA) and state chemicals programs. And they are now touting the 5th Circuit's decision as a victory for that same agenda, with calls to expand the bans beyond CPSC's toy-focused policies.

"It's important to remember that for many children, phthalates in toys and pacifiers are just the tip of the iceberg when it comes to exposure to these harmful chemicals," a March 3 blog post from the Natural Resources Defense Council quotes Michele Roberts, national co-coordinator of the Environmental Justice Health Alliance, as saying.

Last month, the nine-state Toxics in Packaging Clearinghouse, which promotes model legislation to remove toxics in packaging, finalized an update to its draft bill that would ban both phthalates and per- and polyfluoroalkyl substances (PFAS) from packaging materials, embracing a class-based approach to regulating the two chemical groups that industry has resisted.

Environmental groups have also embraced new recommendations for broad phthalate rules in an article published in the most recent *American Journal of Public Health* and written by scientists with the National Institute of Environmental Health Sciences-funded Project Targeting Environmental Neuro-Development Risks (TENDR).

The TENDR scientists urge EPA to regulate phthalates as a class under TSCA rather than continuing to assess and regulate individual substances through the law's existing chemicals program.

EPA "must broaden this effort using a class approach in assessing health impacts," the analysis reads. "Furthermore, EPA should aggressively exercise its authority to regulate the manufacture, import, processing, distribution in commerce, disposal, and known and reasonably foreseeable uses of phthalates."

The article notes that while EPA lacks authority over products regulated by CPSC, such as toys, it could ban a variety of other phthalate uses, including in building materials and direct manufacture of the chemicals.

And while it praises CPSC's toy regulations, it urges the commission to go farther. "The CPSC has authority [...]"

The Controversy with Asbestos Legislation – Where Are We Today?

Treven Pyles, The New Lear

<https://www.thenewlearn.com/2021/03/the-controversy-with-asbestos-legislation-where-are-we-today/>

We know very well that asbestos is among the most studied and harmful toxic agents in the world. Medical and scientific studies conducted as early as 1920 have demonstrated a clear link between asbestos exposure and a series of lung diseases, including lung cancer and mesothelioma. Hundreds of tons of raw asbestos are imported into the U.S. each year, with the majority of it being used in the Chlor-alkali industry for the purpose of producing chlorine, but asbestos has been found in children's crayons, talc, automobile brakes, makeup, and other products. Ever since 1900, asbestos has been majorly used for construction and refractory materials which can still found in older homes, schools, and other buildings across the country. This leads to significant ongoing exposure and with that, the risk for developing serious diseases.

There are tens of thousands of deaths from asbestos-related illnesses in the U.S. each year and not just from working with asbestos products but also by secondary exposure.

So Why Asbestos Is Still Not Banned?

Mining has been banned in 2002 when the last U.S. asbestos mine officially closed. Despite this, it still is legal to import and use it in small amounts. With the lack of a complete ban, there are still several products that can legally contain up to 1% asbestos. Because of the fact that asbestos mining no longer happens on U.S. soil, all asbestos is now imported. The majority of countries have banned asbestos, but the U.S. although making some progress in this direction, still hasn't fully regulated this issue. But to understand exactly why we need to first take a look at the legislative history of asbestos.

1970 – The Clean Air Act classified asbestos as a dangerous air waste matter and gave the EPA the ability to control the use and disposal of it. The act also stated that spray-applied products become illegal.

1976 – The Toxic Substances Control Act (TSCA) provided the EPA the authority to position restrictions on sure chemicals like asbestos, radon, and lead-based paint.

1986 – The Asbestos Hazard Emergency Response Act (AHERA) had the EPA establish standards for inspecting and removing asbestos in schools.

1989 – the EPA issued the Asbestos Ban and Phase-Out Rule (ABPR), which planned to impose a full ban on the production, importation, process, and sale of asbestos-containing merchandise.

2002 – State Senator Patty Murray, D-Wash., introduced the Ban Asbestos in America Act in 2002, which originally aimed to entirely ban asbestos within the U.S.

2007 – The bill (also called the Murray bill) passed the U.S. Senate, however, it died within the U.S. House of Representatives. The Murray bill would have prohibited the importation, manufacture, process, and distribution of merchandise containing asbestos within the U.S.

2008 – The Bruce Vento Ban Asbestos and Stop Mesothelioma Act aimed to amend TSCA to ban even more asbestos-containing products. The bill died in Congress and hasn't been bestowed for a vote once more.

TSCA reforms were enacted in 2016 when the EPA was urged to name asbestos one of the first ten chemicals which would be evaluated under the new law. To most people, this was a necessary and natural further step to take in banning asbestos once and for all, and we were glad to see EPA do it. Despite it, the Trump EPA has disregarded some key ways that the public is exposed to asbestos, which would lead to wholly inadequate health protections. As a result, in 2017 the Federal Court got involved.

In 2019, the Federal Court agreed that the law requires EPA to consider all "conditions of use" in its evaluation of the carcinogen, including manufacture, use, storage, and disposal. Without a strong review of all asbestos uses, the public is still at high risk for potentially developing serious health consequences.

In spite of the ruling, the first part of the risk evaluation for asbestos, released by the EPA on December 30, 2020, didn't address multiple aspects of asbestos [...]

US EPA proposes to ban uses of wood preservative pentachlorophenol

NA, Chemical Watch

<https://chemicalwatch.com/226308/us-epa-proposes-to-ban-uses-of-wood-preservative-pentachlorophenol>

The US EPA has proposed cancelling all uses of pentachlorophenol (PCP) registered under the Federal Insecticide, Fungicide and Rodenticide Act (Fifra), after determining that the wood preservative poses a significant health risk to workers.

PCP is a heavy-duty wood preservative that has been in use since 1936. Today it is primarily used to treat utility poles. The substance poses cancer and non-cancer health risks to workers in wood treatment facilities, according to the EPA.

It said the action is in line with the UN Stockholm Convention on persistent organic pollutants, which has banned uses of PCP. The EU has also recently adopted a new limit value for its presence as an unintentional trace contaminant (UTC) in substances, mixtures or articles, such as recycled wood chips.

The proposed interim decision by the EPA follows its review of PCP's Fifra registration, which the agency conducts at least every 15 years.

It said it has worked with industry to identify safer alternatives, such as copper naphthenate, DCOIT and creosote.

Public comments on the proposal will be accepted for 60 days from the 5 March announcement, after which the EPA will issue an interim decision, which would finalise the cancellation of PCP.

Report: Popular flea & tick collar tied to 1,700 pet deaths, EPA received more than 75,000 complaints

Michael Geheren, Rudabeh Shahbazi, InformNNY

<https://www.informnny.com/top-stories/report-popular-flea-tick-collar-tied-to-1700-pet-deaths-epa-received-more-than-75000-complaints/>

An investigation found that more than 75,000 complaints about the Seresto brand of flea and tick collars have been sent to the Environmental Protection Agency. Investigators have linked the deaths of nearly 1,700 dogs and cats, according to a report co-published by Midwest Center for Investigative Reporting and USA TODAY.

The collars use two types of pesticides to kill fleas and ticks. The EPA said the collars are safe but that some pets may be sensitive to the pesticide combination.

"I know one of the biggest concerns that people have: 'We hate ticks. We hate fleas.' And so do I, but when I go out in the woods, I don't put a pesticide collar around my neck so that I don't get fleas and ticks, because I know it's probably a bad idea to have a pesticide on me," said Dr. Barbara Royal.

The Chicago-based veterinarian joined NewsNation Prime on Saturday to discuss the reporting.

"It's disturbing because I know people are always trying to find something a little bit less toxic and effective at the same time, and it can be very difficult for them to find a product that's going to work," she said.

The popular collars, sold at Amazon, Chewy.com, big-box pet stores and often in veterinary offices, release a small amount of the pesticides over eight months.

The EPA regulates pesticides. NewsNation reached out to the agency about the reporting but has yet to receive a response.

“No pesticide is completely without harm, but EPA ensures that there are measures on the product label that reduce risk,” an EPA spokesperson told USA TODAY and the Midwest Center for Investigative Reporting. “The product label is the law, and applicators must follow label directions. Some pets, however, like some humans, are more sensitive than others and may experience adverse symptoms after treatment.”

Dr. Royal, the founder and owner of the Royal Treatment Veterinary Center in Chicago, said these collars are a bad solution to a difficult problem.

“These flea collars, they seem like they might be less toxic, but people leave them on sometimes too long, or they’re leaving them on all the time, which may be too much. The extended-release type flea collars, those actually increase the risk of having a toxic event because they’re putting out something that’s going to last longer and maybe be a little bit more variable in how much pesticide is put onto your dog,” she said.

So, what should pet parents do if they are hesitant about using flea and tick collars? Dr. Royal said one option is essential oils because ticks don’t like some of the scents, but she said you have to be extra careful with cats.

“Being open to different types of things that are out there is not a bad idea, and then also watching your pet and being careful. So, it may be a little more labor-intensive, but it’s sort of fun to spend after a good walk in the woods, spend some time looking through your pet, making sure you’re checking for the ticks.”

NewsNation also reached out to Elanco, the pharmaceutical company which owns Seresto, but has yet to hear back.

The company did post a statement on their website following the report, saying “there is no established link between death and exposure to the active ingredients contained in Seresto.”

Elanco takes the safety of our products very seriously, and thoroughly investigates potential concerns related to their use. It is critically important to understand that a report is not an indication of cause. Since its initial approval in 2012, more than 25 million Seresto collars have protected dogs and cats in the U.S. from fleas, ticks and the resulting tick-borne illnesses that can impact their quality of life.

- There is no established link between death and exposure to the active ingredients contained in Seresto.
- The reporting rate for all adverse events related to Seresto is less than 0.3% of all collars sold since 2012 – defined by the WHO (World Health Organization) as “uncommon”.
- The significant majority of these incidents [...]

Chlorpyrifos ‘has no place on food’: 100 organizations urge EPA to ban brain-harming pesticide

Ashley Curtin, Nation of Change

<https://www.nationofchange.org/2021/03/06/chlorpyrifos-has-no-place-on-food-100-organizations-urge-epa-to-ban-brain-harming-pesticide/>

Chlorpyrifos, a nerve-agent pesticide used on various food crops, is under review after President Biden signed an executive order directing the Environmental Protection Agency to review the Trump administration’s decision to allow the pesticide’s continued use on 11 foods. But more than 100 farming, public health and environmental organizations are urging the Biden administration to ban the “neurotoxic pesticide.”

Chlorpyrifos belongs to a class of nerve-agent pesticides called organophosphates, and is “acutely toxic and associated with neurodevelopmental harms in children,” according to Earthjustice. Not only is the pesticide harmful to children, it’s

prolonged exposure to farmworkers and endangered species is said to have brain-harming effects, according to multiple studies.

"After a thorough analysis of scientific evidence showing harmful impacts, EPA first proposed a ban on chlorpyrifos in 2015," Daniel Savery, senior legislative representative for the Healthy Communities program at Earthjustice, said. "Six years later, we are still fighting for the pesticide to be cancelled."

According to Earthjustice, the EPA denied a petition to ban chlorpyrifos under the Trump administration. A letter to the current administration's EPA asks the agency to act quickly and end all food and non-food uses of chlorpyrifos immediately.

"When Michael Regan is confirmed, one of his first actions should be to grant the petition and ban this toxic pesticide immediately," Savery said.

Chlorpyrifos is widely used on numerous crops, including apples, cherries, peaches, citrus and wheat. According to multiple studies, the pesticide causes neurodevelopmental harm in children, while prenatal exposure is "linked to lower birth weight, reduced IQ, loss of working memory, attention disorders, and delayed motor development."

As part of their review of the registration of chlorpyrifos, the EPA is currently accepting public comments as required by law.

"It is time for the Biden administration to demonstrate its commitment to science, children, and farmworkers and finish the job," Savery said.

EPA PURSUING PESTICIDES' PFAS PROBLEM

NA, Politico

<https://www.politico.com/newsletters/morning-energy/2021/03/08/texas-grid-tug-of-war-793837>

EPA on Friday said it has launched an investigation into the fluorinated containers that hold commonly used pesticides and other products after initial findings suggested that they are leaching PFOA and other PFAS into the products. The announcement comes after the independent watchdog group Public Employees for Environmental Responsibility last fall found PFAS in the pesticide known as Anvil 10+10, raising concerns about contamination of food and the environment.

EPA said it has asked states to halt use of the mosquito product and is working with the Agriculture Department, the Food and Drug Administration and industry on the issue. In a statement, the agency said that it used all available tools to pursue the contamination associated with the containers, but noted that "the amount of PFAS that has entered the environment from the contamination in the containers the agency tested is extremely small. "

Arkansas State Plant Board votes to change current Dicamba rule

NA, Stuttgart Daily Leader

<https://www.stuttgartdailyleader.com/arkansas-state-plant-board-votes-to-change-current-dicamba-rule/>

The Arkansas Department of Agriculture's State Plant Board held a regularly scheduled board meeting on Wednesday, March 3, 2021.

During the meeting, the board considered a petition for rulemaking seeking changes to the current dicamba rule, Section XIII (B) of the Arkansas Rules on Pesticide Use, found at agriculture.arkansas.gov/wp-content/uploads/2020/05/AR_Regulation_on_Pesticide_Classification_Rev._01-20.pdf. After discussion of the petition, the board voted to initiate rulemaking and proposed a rule that, if adopted, would allow farmers and applicators to

follow the federal label in the use of dicamba.

The proposed rule would allow the over-the-top spraying of Engenia, Xtendimax, and Tavium through June 30 on soybeans and through July 30 on cotton. The proposed rule will also require a pH buffering agent, also called a Volatility Reducing Agent, to be tank-mixed with dicamba, and will require a downwind buffer of 240 feet.

In accordance with the Arkansas Administrative Procedure Act, the proposed rule will be open for public comment for 30 days. Following the public comment period, the board will review any comments received and determine if any changes should be adopted as a result of the comments. The rule will then go to the Arkansas Legislative Council's Administrative Rules Subcommittee, with additional review and approval by the full Arkansas Legislative Council before becoming effective.

The current cutoff date for spraying dicamba in Arkansas is May 25. The May 25 cutoff will remain in effect until a new rule has received final approval.

A copy of the proposed rule and notice of the 30-day comment period and future Plant Board meetings will be available on the Arkansas Department of Agriculture's website as they become available.

Industry Invokes CWA 'Jurisdiction' Precedent In Novel Disinfectant Suit

Diana DiGangi, Inside TSCA

<https://insideepa.com/tsca-news/industry-invokes-cwa-jurisdiction-precedent-novel-disinfectant-suit>

A disinfectant maker is touting as support for its suit seeking to block a possible EPA stop-sale order a Supreme Court decision allowing pre-enforcement challenges to regulators' claims of Clean Water Act (CWA) jurisdiction over particular waterbodies, saying that ruling shows its case can proceed despite the agency's claim it is premature.

In dueling briefs filed this week with the U.S. District Court for the Southern District of New York, EPA and the company Tzumi Innovations clashed over the impact of the 2016 high court case *U.S. Army Corps of Engineers v. Hawkes Co.*, on the company's suit aiming to block a threatened Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) enforcement order that would block it from selling a line of disinfectant wipes.

EPA is arguing that the case is premature because it has not issued a final stop sale, use or removal order (SSURO) against Tzumi that would formally prevent it from selling a product that enforcement officials have said they believe is being illegally marketed as an unregistered surface disinfectant.

But Tzumi in a March 4 letter to the court says the Hawkes precedent requires that "a 'pragmatic approach' must be used when determining finality," and that an "objective and 'pragmatic' review of the facts demonstrates that Tzumi's claims are ripe for judicial review."

The company has focused its arguments in part on an advisory letter from EPA that threatened potential enforcement action against their "Wipe-Out!" product line over label and advertising text that the agency said amount to an attempt to sell the wipes as surface cleaners subject to FIFRA.

EPA has greatly increased its enforcement of FIFRA restrictions on surface cleaners as part of its pandemic response -- an initiative that the agency has touted as protecting customers from products that falsely claim to fight the coronavirus, but which Tzumi said in a prior brief amounts to an overreaching "bureaucratic panic" over a wave of new entries to that market.

Tzumi is asking the court to curtail that action, and now is pointing to Hawkes to bolster that claim, saying the letter it received should be considered "final action" taken by the agency.

In Hawkes, a unanimous high court held that a property owner could sue over regulators' CWA finding that a particular wetland was "jurisdictional" and thus subject to the law's protections even before EPA or the Corps sought to enforce those protections, because the finding amounted to a denial of "safe harbor" from discharge permit mandates or other regulatory requirements.

Thus, the court held, the CWA determination carried legal consequences for its recipients and thus constituted a "final agency action" that could be the subject of a lawsuit under the *Bennett v. Spear* test for standing.

By the same token, Tzumi says, the EPA letter amounted to "a final affirmative jurisdictional determination" claiming FIFRA authority over Wipe-Out!, which the firm says is properly subject to Food and Drug Administration (FDA) rules instead.

"Here, not only did the EPA's Advisory letter contain a final affirmative jurisdictional determination subjecting Tzumi's FDA-registered product to civil enforcement by the EPA under FIFRA, and the legal consequences flowing therefrom, but the EPA has in fact taken enforcement action against 'Wipe Out!' wipes based on the same label at issue in this litigation," the letter says.

The enforcement action it references is a SSURO to the retail giant Amazon that ordered it to halt sales of 70 products including part of Tzumi's Wipe-Out! line.

EPA has previously argued that Tzumi itself has told the agency that it does not sell Wipe Out! "via Amazon, eBay, or any other similar online marketplace, and has told the Government that it is not seeking to restrain EPA from taking enforcement actions against unauthorized third-party sellers on such online marketplaces," which would mean the Amazon order should have no effect on it.

But Tzumi[...]

EPA Proposes to Cancel FIFRA Registration for Pentachlorophenol

BERGESON & CAMPBELL, P.C., Bergeson & Campbell Blogs

<https://www.lawbc.com/regulatory-developments/entry/epa-proposes-to-cancel-fifra-registration-for-pentachlorophenol>

On March 5, 2021, the U.S. Environmental Protection Agency (EPA) announced that "[i]n support of the Biden-Harris Administration's commitment to making evidence-based decisions to protect human health, U.S. Environmental Protection Agency (EPA) is taking an important step by proposing the cancellation of the registration of pentachlorophenol." Pentachlorophenol, a well-recognized wood preservative in use for decades, is registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). According to EPA, it is used primarily on utility poles.

EPA states that after completing a risk assessment, it determined that pentachlorophenol poses significant human health risks to workers. To address this issue, EPA proposes to cancel all uses of pentachlorophenol through the FIFRA registration review process. EPA will accept public comments on the proposed interim decision (PID) for 60 days in docket EPA-HQ-OPP-2014-0653. Comments are due May 4, 2021. 86 Fed. Reg. 12940. At this time, the PID has not yet been posted in the docket. After considering any comments concerning the PID, EPA will issue an interim decision, which would make final the cancellation of pentachlorophenol.

EPA notes that this proposed action would align the United States with the United Nation's (UN) Stockholm Convention on Persistent Organic Pollutants, which has banned the use of pentachlorophenol. According to EPA, it worked with industry stakeholders "to identify a number of viable, safer alternatives such as copper naphthenate and DCOIT, along with well-established wood preservatives such as chromated arsenicals and creosote." EPA's March 5, 2021, Federal Register notice also announces the availability of PIDs for creosote and chromated arsenicals and dichromic acid, disodium salt, dehydrate.

Commentary

That EPA is seeking to eliminate pentachlorophenol is by no means surprising and its demise has been in the works for a while. Its commercial use is already banned in many countries. The Biden Administration was expected to propose cancellation, and wasted little time in doing so. The real debate will be in the terms that EPA eventually settles upon with regard to phase-out and continued use of stockpiled material. The elimination of this product paves the way for a more robust commercial future for the existing pentachlorophenol replacements, and likely soon to be emerging replacements that are efficacious and more sustainable.

EPA Extends Comment Period For Proposed Updates To TSCA Fees Rule

Lynn L. Bergeson, The National Law Review

<https://www.natlawreview.com/article/epa-extends-comment-period-proposed-updates-to-tsca-fees-rule>

EPA announced that it is extending the public comment period on proposed updates to the Toxic Substances Control Act (TSCA) Fees Rule to give stakeholders more time to review and comment. The current comment period was set to close on February 25, 2021. Comments are now due on March 27, 2021. Information on the proposed updates is available in the Bergeson & Campbell, P.C. (B&C®) December 30, 2020, memorandum, "EPA Intends Proposed Rule to Increase Flexibility and Reduce Burdens under TSCA Fees Program."

On February 18, 2021, EPA held a virtual public meeting on the TSCA Fees Rule, allowing stakeholders to provide input on the proposed rulemaking. One of the main concerns by industry stakeholders was related to fees collection under TSCA Section 4. Stakeholders reported that EPA should not collect such fees under Section 4 because the same fees are collected under Section 5. The Alliance for Automotive Innovation proposed instead a tiered fees structure, given that the rule as proposed includes downstream user fees, which would double fees within the supply chain.

On the other hand, representatives from the Environmental Defense Fund (EDF) expressed opposition to the exemptions outlined in the proposed rule and criticized EPA for relying on voluntary information requests.

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